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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 521

SALVADOR PARDO-BOLLAND,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1965

No.

SALVADOR PARDO-BOLLAND,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Salvador Pardo-Bolland, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 29, 1965.

A. The Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit in this case has been reported in F. 2d (1965), and is set forth in Appendix A to this Petition.

B. Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 29, 1965, affirm-

ing the judgment of conviction of the United States District Court for the Southern District of New York, entered July 22, 1964. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code, and Rule 19 of the Supreme Court Rules, to review by writ of certiorari the judgment of the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Where a criminal conviction is predicated in substantial part on evidence obtained by electronic eavesdropping:

   (a) to what extent, if any, is a physical intrusion necessary to invoke Fourth Amendment rights?

   (b) and electronic eavesdropping is a penal offense and evidence obtained thereby is inadmissible under state law, is such evidence admissible in federal criminal prosecutions?

2. Where a prosecution witness, whose presence in federal court was secured by a foreign nation, made and signed a statement concerning his testimony-in-chief for a law enforcement officer of the foreign nation, a copy of which is in court during trial and the contents of which is known to the federal prosecutor, is the statement producible to the defense under Section 3500 of Title 18, United States Code?

D. Constitutional Provisions and Statutes

The constitutional provisions and statutes involved are:

1. Amendment IV, United States Constitution

2. Section 3500, Title 18, United States Code
3. Section 4506, New York Civil Practice Law and Rules
4. Sections 738-40, New York Penal Law
5. Section 813(a)-(b) New York Code of Criminal Procedure

All of the foregoing are set forth in Appendix B, annexed to this Petition.

E. Summary Statement

Petitioner, heretofore the Mexican ambassador to Bolivia and possessed of an unblemished record, was charged in two counts of a three count indictment with a substantive violation and a conspiracy to violate Section 174 of Title 21, United States Code. After a three week jury trial, the petitioner was found guilty on both counts in which he was named, and was sentenced to eighteen years imprisonment and a $20,000. committed fine on each count, the terms of imprisonment to run concurrently.

While the evidence adduced by the Government established that the petitioner met with two alleged conspirators and a co-defendant, the latter also heretofore a foreign diplomat, in France, and that he met with the diplomat and another co-defendant in New York City, the Government offered no evidence of the contents of any conversations during those meetings in France and New York City, nor was there evidence that petitioner ever possessed the drugs imported into the United States by a co-defendant.

The core of the Government's case against the petitioner rests, therefore, on conversations between the petitioner and the other diplomat in their hotel rooms in New York City, conversations providing critical circumstantial evidence of petitioner's involvement in the conspiracy alleged, overheard by Government agents by means of electronic eavesdropping devices. These conversations and two telegrams sent by petitioner to a lady in France, which a Government witness testified he delivered to one of the alleged conspirators, are the sole basis upon which petitioner's conviction is sustained.

F. Reasons for Granting the Writ

I

The electronic eavesdropping, which furnished the only incriminating evidence against petitioner, involved a violation of his Fourth Amendment rights, whether or not a physical intrusion is shown, and also constituted an impermissible implicit deviation from this Court's rejection of the "Silver Platter" doctrine.

Acting on information that petitioner and the other diplomat were to seek rooms in a certain hotel in New York City, agents of the Bureau of Narcotics went to the hotel the day before the two were to check in. The agents made arrangements with the hotel management to obtain rooms adjoining those of petitioner and the other diplomat, had access to the room used by the other diplomat up to the day of his arrival, and arranged with the hotel management to be advised of all calls made and received by the two men,—all for the purpose of conducting an electronic eavesdropping surveillance.

Prior to the arrival of petitioner and the other diplomat, the agents "bugged" the two rooms, without any court order or warrant.

Petitioner's room was "bugged" by utilizing a microphone placed on the threshold[1] under a locked door connecting petitioner's room and the agents' room, taped to the underside of the door and tilted back into the agents' room in such a manner as to form a cup that would act as a sound collector (See Exhibit 1, Appendix C).

The other room, in which petitioner and the other diplomat met and conversed, was bugged by inserting a microphone into a large keyhole on the agents' side of a connecting door (See Exhibits 2 and 3, Appendix C), and taping the equipment in place (See Exhibit 4, Appendix C).

Through the use of these microphones, the agents were able to overhear conversations between petitioner and the other diplomat within the confines of their own rooms. These are the conversations which form substantially the only evidence upon which petitioner's conviction rests.

As this Court had occasion to opine recently:

> "In these circumstances, we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort,

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[1] "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter—but the King of England cannot enter. All his forces dare not cross the threshold of the ruined tenement." Pitt the Elder.

> or real property law." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961).

The courts below, however, took little account of the decision in *Silverman, supra,* and, in a gloss on the record, concluded merely "that there had been no technical trespass into either of the hotel rooms. . . ."

There surely was here "an unauthorized physical penetration into the premises occupied by" petitioner, *Silverman* v. *United States, supra,* at 509. It might, of course, require an engineer with calipers or a micrometer to determine the depth or degree of penetration. It is, however, inconceivable that constitutional rights "are to be measured in fractions of inches". *Silverman* v. *United States*, 275 F. 2d 173, 178 (D.C. Cir. 1960).

Where should the line be drawn? For we have already witnessed the arrival of that electronic age presaged by Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 471 (1928):

> "The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home."

The permissible limits of electronic eavesdropping have yet to be defined. Is "an unauthorized *physical* encroachment" necessary to claim Fourth Amendment rights, and if so to what extent? Do these rights depend upon the accuracy of engineers' tools to be applicable? How long is the judicial process to lag in protecting primary rights

in an advancing electronic era?[2] Petitioner submits that the practices engaged in by the Federal agents violated his Fourth Amendment rights, whatever limit is fixed for their application.

Moreover, unlike the situation described in *Lanza* v. *New York*, 370 U.S. 139 (1962), the Federal agents here secured evidence by electronic eavesdropping without a warrant or court order which was "introduced in a prosecution against the petitioner", *Lanza, supra,* at 145,—evidence which was, by state law, obtained illegally and which, by state law, was inadmissible against petitioner in a state court, civil or criminal. *N. Y. Penal Law,* §§ 738-40; *N.Y. Code of Crim. Proc.,* § 813(a); *N.Y. Civil Practice Law & Rules,* § 4506. Thus, while the illegal conduct of the Federal officers violated state statutes only, the decision below places Federal courts in the position of receiving evidence illegally obtained by Federal officers and inadmissible in state courts, an anomaly in light of this court's rejection of the "Silver Platter" doctrine in *Elkins* v. *United States,* 364 U.S. 206 (1960).

> "[W]hen this Court puts its imprimatur upon conduct so universally reproached by every branch of the Government of the State in which the case arose, we invite official lawlessness which, in the long run, can be more harmful to our society than individual contumacy." *Lanza* v. *United States, supra* at 150.

Surely it should not be the case that evidence which would be inadmissible in state courts can be *the* evidence essential to sustain a Federal criminal judgment in that same state.

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[2] See 1963 Proceedings of Section of Criminal Law, American Bar Association, pages 22-28.

II

A pretrial statement of a Government witness is not insulated from production under Section 3500 of Title 18, United States Code, by reason of its having been made to an officer of a foreign nation whose law forbids its production.

The witness who gave the highly damaging testimony that two cablegrams petitioner sent to a lady in France were turned over by him to one of the alleged conspirators was a French national. On cross-examination, this witness testified that he had given a statement concerning his direct testimony to a member of the French police who was cooperating with Federal agents. When the witness came to the United States to testify at petitioner's trial, the French police officer accompanied him and sat at the prosecution counsel table during trial. During a *voir dire* hearing to determine producibility of the statement, the French police officer testified that he had copies of the statement with him in court, and that he had discussed the contents of the statement with the federal prosecutor before trial.

When production of the statement was sought, the Government urged and the trial court concluded that:

> "under international comity I am not going to ask the French Government to change their rules. There is no evidence other that [sic] what this witness testified to. He has testified under the French regulations this is a secret procedure which he is not allowed to divulge. He has indicated that the substance of the witness' testimony is in the statement and I will sustain the government's objection."

The statement was not turned over to petitioner for use during cross-examination of the witness, nor was it turned over to the trial court for examination *in camera.*

The Court of Appeals, in affirming, merely said:

> "While this statement might well have been ordered produced *if available,* the court, relying on the representation of a French officer that French law forbade its production, was within its discretion in refusing to order it." (Emphasis supplied.)

The legislative history of Section 3500 of Title 18, United States Code, makes clear that the statute's provisions are not discretionary.

> "The proposed legislation is not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process is concerned . . . the proposed legislation . . . reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at trial . . ." 1957 U.S. Code Cong. & Admin. News 1862.

The only decision to be made by the trial court is the decision as to relevance. *Id.* at 1863. Once relevancy is determined, production is commanded.

There is no doubt that the statement sought was a statement previously made by the Government witness concerning his direct testimony. Nor is there doubt that the Government had constructive, if not actual possession of the statement, that it was available and in court during trial, and that the prosecutor had been made aware of the con-

tents of the statement before trial by the foreign officer who invoked the privilege accorded such a statement under foreign law.[3]

Surely no court in this country is bound by an alleged privilege under foreign law. In the progenitor of Section 3500 of Title 18, United States Code, this Court, citing *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944) approvingly concluded:

> "in criminal causes ' . . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . .' " *Jencks* v. *United States,* 353 U.S. 657 (1957), 671.

The Government's obligation under Section 3500 of Title 18, United States Code, must be more clearly defined by this Court.

CONCLUSION

For the reasons hereinabove set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN L. ROSNER
Attorney for Petitioner

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[3] Query: Is the testimony of a non-expert witness as to the applicable French law sufficient proof of such?

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 243—September Term, 1964.

(Argued December 4, 1964 Decided June 29, 1965.)

Docket No. 29218

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVADOR PARDO-BOLLAND and RENE BRUCHON,

Defendants-Appellants.

Before:

FRIENDLY and SMITH, *Circuit Judges,* and
BLUMENFELD, *District Judge.**

Appeal by defendants Pardo-Bolland and Bruchon from judgments imposing sentences of fine and imprisonment on conviction after trial before a jury in the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* for violation of the Narcotic Act, 21 U. S. C. §§173-174. Affirmed.

* Sitting by designation.

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit

JACK D. SAMUELS, Asst. United States Attorney, Southern District of New York (Robert M. Morgenthau, United States Attorney, and David M. Dorsen, John S. Martin, Jr. and William M. Tendy, Asst. United States Attorneys, on the brief), *for appellee.*

BERNARD TOMPKINS, New York, N. Y. (Tompkins & Lauren, New York, N. Y., on the brief), *for appellant Pardo-Bolland.*

ALBERT J. KRIEGER, New York, N. Y., *for appellant Bruchon.*

SMITH, *Circuit Judge*:

The defendants Salvador Pardo-Bolland, Rene Bruchon and Juan Carlo Arizti were convicted after trial before a jury in the United States District Court for the Southern District of New York, John M. Cannella, *J.*, of violating Title 21, U. S. C. §§173-174, which prohibits the receiving, concealing and selling, etc. of narcotics illegally imported into the United States, and of conspiring to violate the federal narcotics laws. Bruchon and Bolland, sentenced respectively to fifteen and eighteen year terms concurrently on each count, and fined $20,000 on each count, appeal their convictions. Arizti received a sentence of ten years imprisonment and was fined $20,000; he has not perfected his appeal. We find no error and affirm the convictions of Bruchon and Bolland.

I. THE EVIDENCE

The facts, of which there was evidence at the trial, may be summarized as follows: On February 10, 1964, the appellant Pardo-Bolland, then Mexican Ambassador to Bo-

livia, registered at a hotel in Cannes, France under the assumed name of Lorenzo Suarez de Mendoza and, at the same time, cancelled a reservation he had previously made for the Uruguayan Minister Plenipotentiary, the defendant Arizti. The next morning Bolland met Arizti, upon the latter's arrival in Cannes, at the Cannes railroad station. Two days later, Bolland was seen leaving his hotel and driving away in a car accompanied by two alleged co-conspirators, Gilbert Coscia and Jean Baptiste Giacobetti, and a short while after that Bolland and Coscia were seen together with Arizti at Arizti's hotel. Following two separate meetings, one between Bolland, Coscia and Giacobetti, and the other between Coscia and Arizti, Arizti on February 15 departed by plane from the Nice airport for Montreal carrying with him seven pieces of luggage, four of which were handed to him by a porter only minutes before he boarded the aircraft. Upon his arrival in Montreal, Arizti managed to get the baggage through customs without its being inspected on the strength of his diplomatic passport. However, unbeknown to him, a member of the Royal Canadian Mounted Police, acting under authority of a writ of assistance, had at the Montreal airport opened one of the four bags that Arizti had been handed at the Nice airport and had observed a number of plastic bags containing a white powder. After leaving the airport, Arizti went directly to the Montreal train station where he checked the bags in public coin lockers. Two days later the Canadian police, again acting under authority of a writ of assistance, opened the lockers and removed the four suitcases. Of the 62 kilograms of heroin found inside, 61 kilograms were removed (approximately a quarter kilo-

gram was left in each bag) and replaced with flour, and the bags were then returned to the lockers.

In the meantime, on February 15 the appellant Bruchon flew from Geneva to New York carrying a passport which, though it bore his picture, was issued under the name of Jean LeRoux; Bruchon registered at Manhattan's Americana Hotel under that name. The following day Bolland flew from Paris to New York and registered in Room 1105 of the Elysee Hotel in the City; he also made a reservation at the same hotel for Arizti for February 18. That evening Bolland, who, along with Bruchon was under constant surveillance by federal narcotics agents, sent a cablegram from Grand Central Station addressed to one Carmen Lopez in Nice, France, thanking her for her hospitality and signed "Lorenzo Suarez." After he had written out his message and left, the narcotics agent who was following him entered the Western Union office, displayed his badge and demanded to see the writing. The clerk acquiesced, and the agent made a handwritten copy.

On February 18, Arizti arrived by train at New York's Pennsylvania Station carrying with him the four suitcases which now contained a relatively small quantity of heroin and a much larger amount of flour. He immediately checked the bags in a parcel room and received four baggage checks. Within two hours after Arizti's arrival in New York, a narcotics agent who had traveled on the same train from Montreal, succeeded in obtaining a search warrant signed by United States District Judge Noonan and proceeded to search the luggage. A portion of the contraband contents was removed, and the bags were replaced in the station's parcel room.

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit

Arizti, upon leaving Pennsylvania Station, went directly to the Elysee Hotel where he registered for Room 1102A, the room reserved for him by Bolland. Almost immediately after Arizti had checked into his room, Bolland joined him there. Narcotics agents occupied an adjoining room and, with the help of electronic listening devices, were able to overhear Bolland tell Arizti that he would see "the man" that day and that "on business like this you have to be extra careful."

Following his meeting with Arizti, Bolland promptly went to the Americana Hotel where he asked the room clerk for a Mr. Blanc. He was told that no one with that name was registered there. Bolland made the same inquiry at the Savoy Hilton and received the same answer. He then proceeded to an office of the American Cable and Radio Company and wrote out a second cablegram addressed to Carmen Lopez and containing the following message: "Cousin is not found address indicated," signed "Richard Bernard." The narcotics agent who was watching Bolland saw this message in the same manner as the first. It was then transmitted and in due course received in France, as in the case of the first cablegram, by Coscia who was posing as one Roby.

On his return to the Elysee, Bolland spoke to Arizti and was overheard, by means of the electronic eavesdropping apparatus, telling Arizti about his inability to locate Mr. Blanc. Bruchon or LeRoux, of course, and not Blanc, was the man Bolland should have been looking for. According to the Government, that apparent mistake was corrected two days later when Bolland received a telephone call from a "Dr. Guitterez" in Nice, France. After receiv-

ing the call, Bolland went back to the Americana Hotel, made an inquiry at the desk and proceeded to Room 4924, the room into which Bruchon had checked. Bolland stayed no longer than about two minutes, and after he left, Bruchon followed a short time later. That afternoon Bruchon was observed as he dropped a set of keys in a trash basket located on the corner of 51st Street and Broadway—those keys were found to fit the four suitcases that had been deposited in the parcel room of Pennsylvania Station.

The next morning, February 21, both Bruchon and Arizti received telephone calls advising them to leave New York immediately. Arizti relayed the warning to Bolland, and both he and Bolland thereupon went directly to a Pan American office and booked the first available space on two separate flights to Uruguay and Bolivia respectively. Their arrests followed.

At about the same time as Arizti and Bolland were preparing for their departure, Bruchon also was making haste to leave the country. He proceeded directly to a Swiss Air office and reserved a seat on the first available flight to Switzerland. As he left the office and walked down the street, he apparently realized that federal agents were approaching him and quickly dropped an envelope found to contain the baggage checks to the four unclaimed suitcases in Pennsylvania Station.

II. The Cablegrams

The trial court, over the objections of defense counsel, permitted the two cablegrams sent by Bolland to Carmen Lopez (Coscia) to be admitted into evidence. Defendant Bolland contends that the cablegrams were inadmissible

in that they were illegally obtained under Section 605 of the Federal Communications Act which provides in pertinent part as follows:

> "No person receiving or assisting in receiving or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purpose, effect, or meaning thereof, except * * * in response to a subpoena issued by a court of competent jurisdiction, or on *demand of other lawful authority;* and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * " (Emphasis added.)

The Government, on the other hand, argues that the agent's obtaining the contents of the messages constituted a "demand of other lawful authority" under the statute and that, in any event, the subsequent subpoenas of the cablegrams rendered them admissible. While we do not necessarily agree with the Government's interpretations of this statutory language, we do find that the Government's alternative ground for admissibility is compatible with Section 605 and the cases decided thereunder. In other words, the cablegrams were admissible because knowledge of their transmission was acquired from an independent source and because they were obtainable and were in fact subsequently obtained by other legal means. So far as the appellant Bruchon is concerned, his standing to object is doubtful for he is not a sender. *Goldstein* v. *United States,* 316 U. S. 114 (1941).

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit

The admission in evidence of the contents of the cablegrams under the circumstances of this case was not error. Where, as here, the sending of the messages is independently known to the officers from their own observations, the communications could have been obtained on demand by the agents' superior, the Secretary of the Treasury, and subpoenas were in fact obtained and served prior to trial with respect to the transmittals, there has been sufficient compliance, even though belated, with the Communications Act, and appellants' rights have not been violated. Indeed, *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920), relied on by appellants, itself stated that information improperly acquired will be admissible if elsewhere "gained from an independent source," 251 U. S. at 392, an exception that surely applies to the statutory protection of Section 605 at least as readily as to the constitutional right involved in *Silverthorne.*

The narcotics agent assigned to keeping Bolland under surveillance observed Bolland both times that Bolland entered the telegraph offices and wrote out the cables; it was natural to expect that the agent and his co-agents would be curious about their contents and would obtain copies.[1]

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[1] In *Silverthorne Lumber Co.* v. *United States, supra,* the Court expressly recognized that even though the seizure of the evidence in the first instance may have been illegal, the facts disclosed thereby may nevertheless be proved like any others if knowledge of them is gained from an independent source. Said the Court:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, * * *" 251 U. S. at 392.

If the agent had been less zealous in carrying out his assignment and had appraised the situation with greater care, he probably would not have intercepted the cablegrams when he did and instead would have relied on the power of the Secretary of the Treasury, pursuant to Title 21, U. S. C. §198a, b,[2] and arranged to subpoena all cables sent between certain times—a course that might have led

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[2] Title 21 U. S. C. §§198a and 198b provide as follows:

§198. Authority of Secretary of Treasury to administer oaths, issue subpenas, and compel attendance of witnesses; fees and mileage of witnesses

For the purpose of any investigation which, in the opinion of the Secretary of the Treasury, is necessary and proper to the enforcement of the laws of the United States relating to narcotic drugs and marihuana, the Secretary of the Treasury is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any records (including books, papers, documents, and tangible things which constitute or contain evidence) which the Secretary of the Treasury finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing: *Provided,* That a witness shall not be required to appear at any hearing distant more than one hundred miles from the place where he was served with subpena. Witnesses summoned by the Secretary of the Treasury shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

§198b. Service of subpena; proof of service

A subpena of the Secretary of the Treasury may be served by any person designated in the subpena to serve it. Service upon a natural person may be made by personal delivery of the subpena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpena to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpena entered on a true copy thereof by the person serving it shall be proof of service.

to a more substantial divulgence of private communications than that pursued. The ease with which the Secretary of the Treasury may legally authorize the issuance of a subpoena in furtherance of a narcotics investigation points to another very significant difference between this case and *Silverthorne, supra.* In *Silverthorne,* the Government was required to meet the more stringent test of satisfying a judicial officer that it was entitled to a search warrant.

In any event, this apparent mistake in judgment was unequivocally rectified when the two cablegrams were obtained by subpoenas prior to trial.[3] As already noted, there was sufficient information independent of the illegal interceptions to justify the subsequent applications for and granting of subpoenas, and it was a near certainty that the cables would have been acquired by subpoena even had the original disclosures never occurred. See *Somer* v. *United States,* 138 F. 2d 790, 792 (2 Cir. 1943); *Sullivan* v. *United States,* 219 F. 2d 760, 762 (D. C. Cir. 1955). The contents of the cablegrams were not rendered inadmissible under the "fruit of the poisonous tree" doctrine. See *Peek* v. *United States,* 321 F. 2d 934, 939 (9 Cir. 1963). Compare *United States* v. *Paroutian,* 299 F. 2d 486 (2 Cir. 1962).

III. Electronic Eavesdropping

A substantial part of the case against the defendants was obtained through the "bugging" of Bolland's and Arizti's rooms at the Hotel Elysee with electronic eavesdropping equipment. Appellants Bolland and Bruchon now contend that this evidence was inadmissible on two counts:

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[3] One subpena was obtained on February 20, 1964, prior to defendants' arrest, and the other on April 22, 1964.

(1) the eavesdropping was accomplished by the invasion of a constitutionally protected area; (2) the evidence was secured by official lawlessness prohibited by New York law and condemned by federal decisions. With respect to the first point, the trial court found, after a hearing on Bolland's pre-trial motion to suppress the evidence, that the listening devices had been installed and utilized as the Government agents represented them to have been[4] and accordingly that there had been no technical trespass into either of the hotel rooms of the defendants, which is still essential to a violation of federal law under *United States* v. *Goldman,* 316 U. S. 129 (1943).[5] There is substantial evidence in the record to support those findings.

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[4] Appellants argued on the motion to suppress, with the use of photographs taken some time after the event, that the agents who occupied one of the adjoining rooms at the Hotel Elysee had gouged out the keyhole of the common door and planted a microphone in the depression. The Government proved to the satisfaction of the court, however, that that particular listening device had been taped over the keyhole, and not inside it, after the metal plate covering the keyhole had been swung aside.

Two other listening devices were utilized by the Government. In the room adjoining Bolland's at the Elysee, the narcotics agents placed a microphone in front of the small opening between the floor and the bottom of the common door that separated the two rooms; it did not in any way penetrate under the door. And, in the Americana Hotel, the agents placed a microphone over a telephone wire and a hole, which was made to accommodate the wire, that ran through the common wall between the agents' room and Bruchon's adjoining room.

[5] The concept of "physical trespass" has been further developed by the Supreme Court in decisions subsequent to *Goldman.* See *Silverman* v. *United States,* 365 U. S. 505 (1961) and *Clinton* v. *Virginia,* 377 U. S. 158 (1964), both "spike mike" cases. An informative article on the subject has been published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association entitled, "The Problem of Electronic Eavesdropping" (1961).

The real question here is whether the eavesdropping evidence was admissible in a federal criminal proceeding in view of the fact that the New York legislature has seen fit specifically to prohibit eavesdropping. Sections 737-745 of the New York Penal Law make it a felony, punishable by up to two years imprisonment, for a person, including "any law enforcement officer," to eavesdrop except where an ex parte order authorizing the eavesdropping has been granted pursuant to Section 813-a of the New York Code of Criminal Procedure.[6] Section 4506 of the Civil Practice

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[6] Sections 737-745 of the New York Penal Law and Section 813-a of the Code of Criminal Procedure provide in pertinent part:

§738. Eavesdropping

A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to do so, without the consent of either a sender or receiver thereof; or

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping.

§739. Exemption

There shall be exempt from the provisions of this article:

1. eavesdropping pursuant to an ex parte order granted pursuant to section eight hundred thirteen-a of the code of criminal procedure;

2. eavesdropping, as described in subdivision two of section seven hundred thirty-eight of this article, by a law enforcement officer pursuant to section eight hundred thirteen-b of the code of criminal procedure without an ex parte order obtained pursuant to section eight hundred thirteen-a of said code;

Laws and Rules goes even farther by declaring that any evidence obtained by eavesdropping in violation of the Penal Law and Section 813 of the Code of Criminal Pro-

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3. the normal operation of a telephone or telegraph corporation; and

4. the normal use of the services and facilities furnished by such corporation pursuant to its tariffs.

§740. Punishment for eavesdropping

A person who violates any subdivision of section seven hundred thirty-eight of this chapter shall be guilty of a felony punishable by imprisonment for not more than two years.

§741. Person defined.

As used in this article, the word "person" shall mean any individual, partnership, corporation or association including the subscriber to the telephone or telegraph service involved and any law enforcement officer.

§813-a. Ex parte order for interception, overhearing or recording

An ex parte order for the interception, overhearing or recording of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone number or telegraph line, and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for intercepting, overhearing or recording, or directing the interception, overhearing or recording of

cedure is inadmissible for any purpose in any civil or criminal proceeding.[7]

The New York statutes involved here, however, do not appear to have been intended to apply to federal law enforcement officers. Section 13-a of the Code of Criminal Procedure makes no provision for federal officers, as distinguished from state or local officers, to obtain ex parte orders permitting eavesdropping activities; the statute specifically limits the granting of such an order to a district attorney, the attorney-general or "an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof." Under these circumstances, therefore, it seems most likely that the policing of the activities of federal officers was intended to be left to federal statute and the supervision of federal courts, which so far have drawn the line at the point of physical trespass.

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the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same.

[7] Section 4506 reads:

Evidence obtained by any act of eavesdropping, in violation of section seven hundred thirty-eight of the penal law, or by any act in violation of section eight hundred thirteen-b of the code of criminal procedure, or by eavesdropping without court order, as permitted by said section of the code of criminal procedure, when an application for such order is thereafter made as required by said section but is denied, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any civil or criminal action, proceeding or hearing; provided, however, that any such evidence shall be admissible in any civil or criminal action, proceeding or hearing against the person who has, or is alleged to have, violated section seven hundred thirty-eight of the penal law or section eight hundred thirteen-b of the code of criminal procedure.

United States v. *Goldman, supra.* In view of this construction, we need not even consider the power of a state to regulate the actions of federal law enforcement officers or the admissibility in a federal court of evidence procured by such officers in violation of state law. Cf. *Olmstead* v. *United States,* 277 U. S. 438, 468 (1928); *On Lee* v. *United States,* 343 U. S. 747, 754-55 (1952).[8]

IV. Illegal Importation and Constructive Possession

Bolland and Bruchon both attack the sufficiency of the proof with respect to their alleged illegal importation and constructive possession of the narcotics, contending that the Canadian and later the United States law enforcement officers as a matter of fact and of law had actual control of the bags originally containing the 62 kilograms of heroin from the time of their initial interception in Canada and continuing through their removal from and replacement in the parcel room of New York's Pennsylvania Station.

This argument we find without merit. When articles are moving in transit, under the arrangements of criminal conspirators, law enforcement agencies should not be denied the opportunity of allowing some part of the contraband to continue in movement for the purpose of snaring and acquiring evidence against all those implicated in the particular plan. In this case, Arizti, and not the federal agents,

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[8] We may also note that Bruchon's standing to object to eavesdropping on others is doubtful, and that the essential portions of the information obtained by eavesdropping on Bolland were also independently gained by the surveillance carried on during the entire course of the transactions. It was the surveillance rather than the eavesdropping that led to Bruchon.

transported the heroin into this country. And so long as the movement continued, which it did, and control, however temporary, was possible in both Bolland and Bruchon, who at one time or another possessed the claim checks and the baggage keys, sufficient dominion to establish constructive possession was present with respect to each. Whether the agents would have been successful in halting the asportation from Pennsylvania Station, had the claim check holder taken the bags from the parcel room, is immaterial.

Both Bolland and Bruchon, at one time or another, had actual possession of the baggage checks and keys. Arizti testified that upon his arrival in New York, he immediately met with Bolland in his room at the Elysee and turned over the baggage checks and keys to Bolland. Apart from that testimony, it was reasonable for the jury to conclude from the fact that Bruchon had the keys and checks shortly before he was apprehended that he had received them from Bolland since Government surveillance revealed that Bolland was the only person he had seen at the Americana who could have given them to him.

Here, Bolland's and Bruchon's actual possession of the keys and checks was sufficient to establish constructive possession of the bags of heroin. "Constructive possession" is that which exists without personal occupation of land or without actual personal present dominion over a chattel, but with intent and capability to maintain control and dominion. *Rodella* v. *United States,* 286 F. 2d 306, 311 (9 Cir. 1960), cert. den. 365 U. S. 889 (1961). Possession may, but need not, imply title. See also *United States* v. *Santore,* 290 F. 2d 51, 60-61 (2 Cir.), rehearing *en banc,* 290 F. 2d

74 (1960), cert. den. 365 U. S. 834 (1961); *Covarrubias* v. *United States,* 290 F. 2d 157, 158 (9 Cir.), cert. den. 368 U. S. 859 (1961); *United States* v. *Buonanno,* 290 F. 2d 585, 586 (2 Cir. 1961); *Teasley* v. *United States,* 292 F. 2d 460, 467-468 (9 Cir. 1961); *Ramirez* v. *United States,* 294 F. 2d 277, 283 (9 Cir. 1961); *United States* v. *Ladson,* 294 F. 2d 535, 540-541 (2 Cir. 1961), cert. den. 369 U. S. 824 (1962); *Hernandez* v. *United States,* 300 F. 2d 114, 116-117 (9 Cir. 1962). And circumstantial evidence alone may be utilized to determine the fact of possession. *United States* v. *Rodella, supra.* Aside from the appellants' possession of the baggage checks and keys, there was also present here strong circumstantial evidence of actual knowledge of illegal importation.

The fact that the Government obtained a search warrant within just two hours after the bags arrived in New York City did not interfere with Bolland's and Bruchon's constructive possession of the narcotics after that time. A search warrant is required only to prevent an unreasonable and, therefore, illegal search and seizure, and it does not require that the law enforcement officers take instant possession of any contraband that they might thereby discover. "To require immediate seizure of the contraband upon discovery would deprive federal officers of a most effective method of obtaining evidence against ultimate consignees * * *." *United States* v. *Davis,* 272 F. 2d 149, 153 (7 Cir. 1959). Rule 41 of the Federal Rules of Criminal Procedure requires only that the return be prompt and that, in any case, the return be within 10 days of the warrant. We find here no violation of either the terms or spirit of the rule.

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit

V. Admission and Production of Other Evidence

Appellants cite several errors allegedly committed by the trial court in permitting the admission of certain evidence and in refusing to compel the Government to produce certain other evidence. We hold that all the rulings were properly within the discretion of the court.

Bruchon's separate attack on the admissibility of the agent's testimony of Bolland's statement to Arizti that "in the past the man has always been here when I arrived" as merely narrative of past occurrences is not well taken, for the narration was not merely historical but was relevant to the criminal conspiracy in which Bolland, Arizti and Bruchon were engaging. A statement of one conspirator to another during the active course of a conspiracy, giving the full setting of an upset, with the purpose of getting reassurance or other help, does not cease to be in furtherance of the conspiracy because it contains a natural and pertinent reference to a past fact. Cf. *United States* v. *Annunziato,* 293 F. 2d 373, 380 (2 Cir.), cert. denied 368 U. S. 919 (1961).

Bolland claims that he was irreparably prejudiced by the introduction of testimony with regard to Coscia and Giacobetti, two alleged co-conspirators. However, testimony as to their activities and declarations was properly admitted as evidence of acts in furtherance of the conspiracy. The existence of the conspiracy was clearly established, and, once it has been so proved, only evidence which, viewed alone, is of relatively slight import, is needed to connect each conspirator with it. *United States* v. *Marchisio,* 344

F. 2d 653 (2 Cir. 1965); *Poliafico* v. *United States*, 237 F. 2d 97, 104 (6 Cir. 1956), cert. den. 352 U. S. 1025 (1957).

Finally, appellants contend that the trial court should have ordered the production of a signed statement that the Government's witness Hyacinthe Lucchesi gave to the French Surete. Lucchesi, the owner of the hotel to which Bolland addressed his two cablegrams, testified on direct examination, among other things, that he had been instructed by Coscia to turn over to him all mail and other communications addressed to "Carmen Lopez" and that he had in fact done just that. On cross-examination he rerevealed that he had given the French police a signed statement which related to this and other testimony. While this statement might well have been ordered produced if available, the court, relying on the representation of a French officer that French law forbade its production, was within its discretion in refusing to order it.

VI.

Other miscellaneous errors allegedly committed by the trial court are urged upon us by appellants. We find them all to be without merit. The judgments of conviction of Pardo-Bolland and Bruchon are affirmed.

APPENDIX B

Constitutional Provisions and Statutes

AMENDMENT IV, UNITED STATES CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

TITLE 18, UNITED STATES CODE

" §3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order

it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from

the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

NEW YORK PRACTICE LAW AND RULES

" §4506. Eavesdropping evidence.

Evidence obtained by any act of eavesdropping, in violation of section seven hundred thirty-eight of the penal law, or by any act in violation of section eight hundred thirteen-b of the code of criminal procedure, or by eavesdropping without court order, as permitted by said section of the code of criminal procedure, when an application for such order is thereafter made as required by said section but is denied, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any civil or criminal action,

proceeding or hearing; provided, however, that any such evidence shall be admissible in any civil or criminal action, proceeding or hearing against the person who has, or is alleged to have, violated section seven hundred thirty-eight of the penal law or section eight hundred thirteen-b of the code of criminal procedure."

NEW YORK PENAL LAW

" §738. Eavesdropping

A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to do so, without the consent of either a sender or receiver thereof; or

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to do so, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to do so; is guilty of eavesdropping."

"§ 739. Exemption

There shall be exempt from the provisions of this article:

1. eavesdropping pursuant to an ex parte order granted pursuant to section eight hundred thirteen-b of the code of criminal procedure;

2. eavesdropping, as described in subdivision two of section seven hundred thirty-eight of this article by a law enforcement officer pursuant to section eight hundred thirteen-b of the code of criminal procedure without an ex parte order obtained pursuant to section eight hundred thirteen-a of said code;

3. the normal operation of a telephone or telegraph corporation; and

4. the normal use of the services and facilities furnished by such corporation pursuant to its tariffs."

"§ 740. Punishment for eavesdropping

A person who violates any subdivision of section seven hundred thirty-eight of this chapter shall be guilty of a felony punishable by imprisonment for not more than two years."

NEW YORK CODE OF CRIMINAL PROCEDURE

"§ 813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general

or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communication, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for any period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was made, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

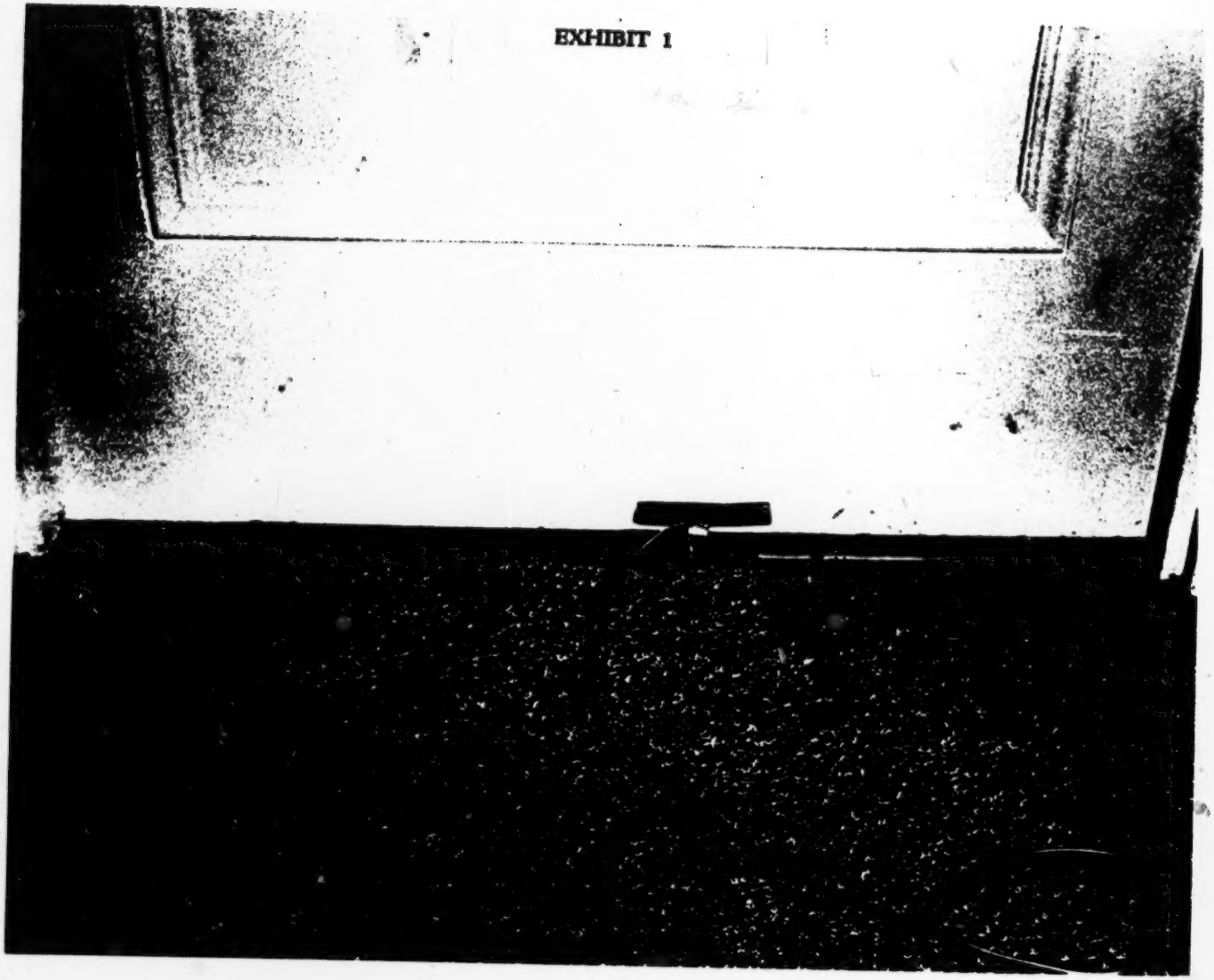
"§ 813-b. Eavesdropping by law enforcement officers without court order under certain circumstances

Orders for eavesdropping as set forth in section eight hundred thirteen-a of this code must be obtained before the eavesdropping commences, except as hereinafter in this section provided. A law enforcement officer may eavesdrop as described in subdivision two of section seven hundred thirty-eight of the penal law without a court order obtained pursuant to section eight hundred thirteen-a of this code only when he has reasonable grounds to believe (1) that evidence of crime may be thus obtained, and (2) that in order to obtain such evidence time does not permit an application to be made for such a court order before such eavesdropping must commence. In any such case an application for a court order pursuant to section eight hundred thirteen-a of this code must be made within twenty-four hours after such eavesdropping commenced. In computing said twenty-four hour period legal holidays shall not be considered. The application for such a court order must contain, in addition to the requirements set forth in section eight hundred thirteen-a of this code, the time when such eavesdropping commenced. If such application is granted, the order shall be made effective from the time the eavesdropping commenced. If the application is denied, the eavesdropping must cease immediately. Any violation of this section, shall be a felony punishable by imprisonment for not more than two years."

APPENDIX C—EXHIBIT 1

(Mounted opposite)

EXHIBIT 1



APPENDIX C—EXHIBIT 2

(Mounted opposite)

EXHIBIT 2

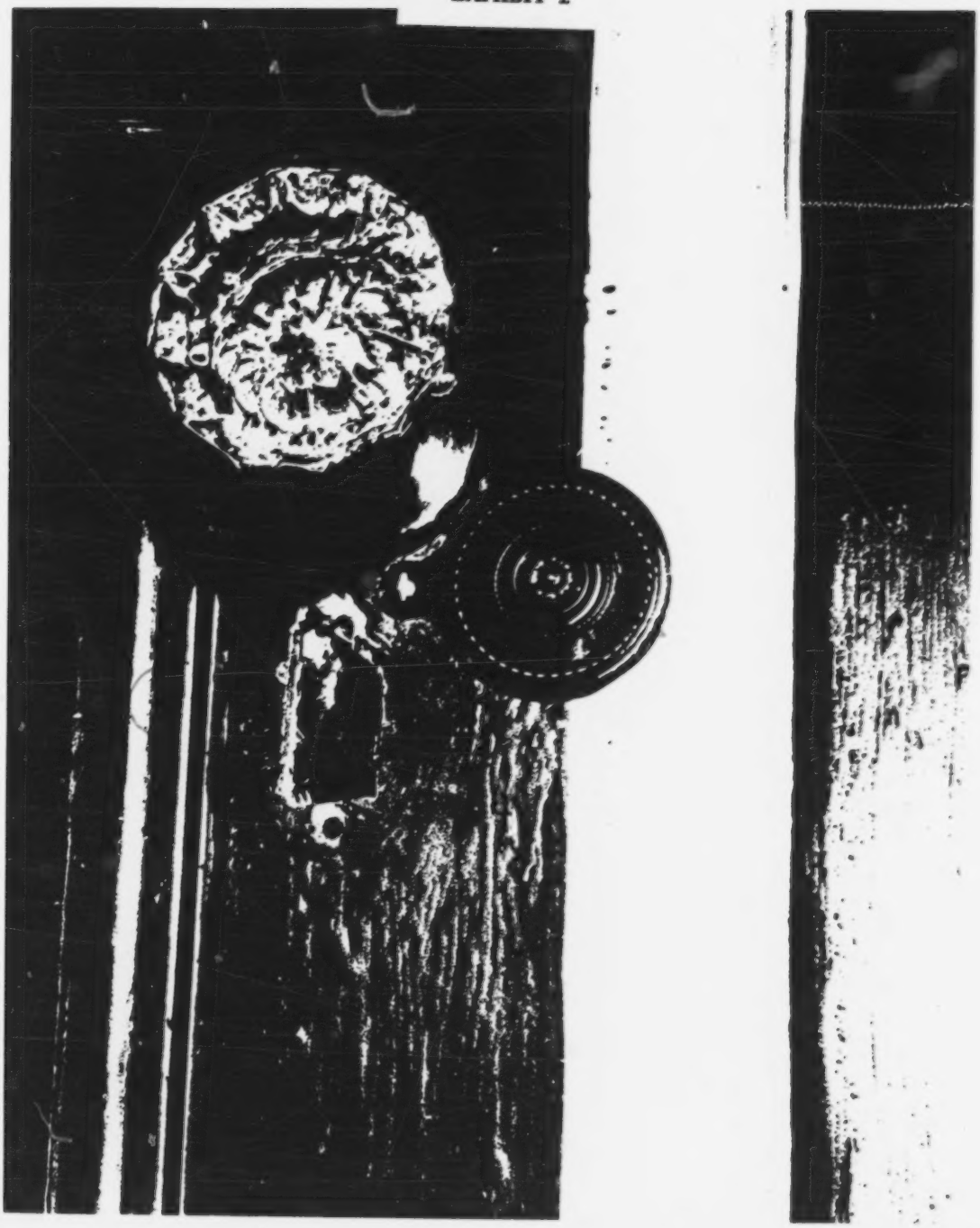


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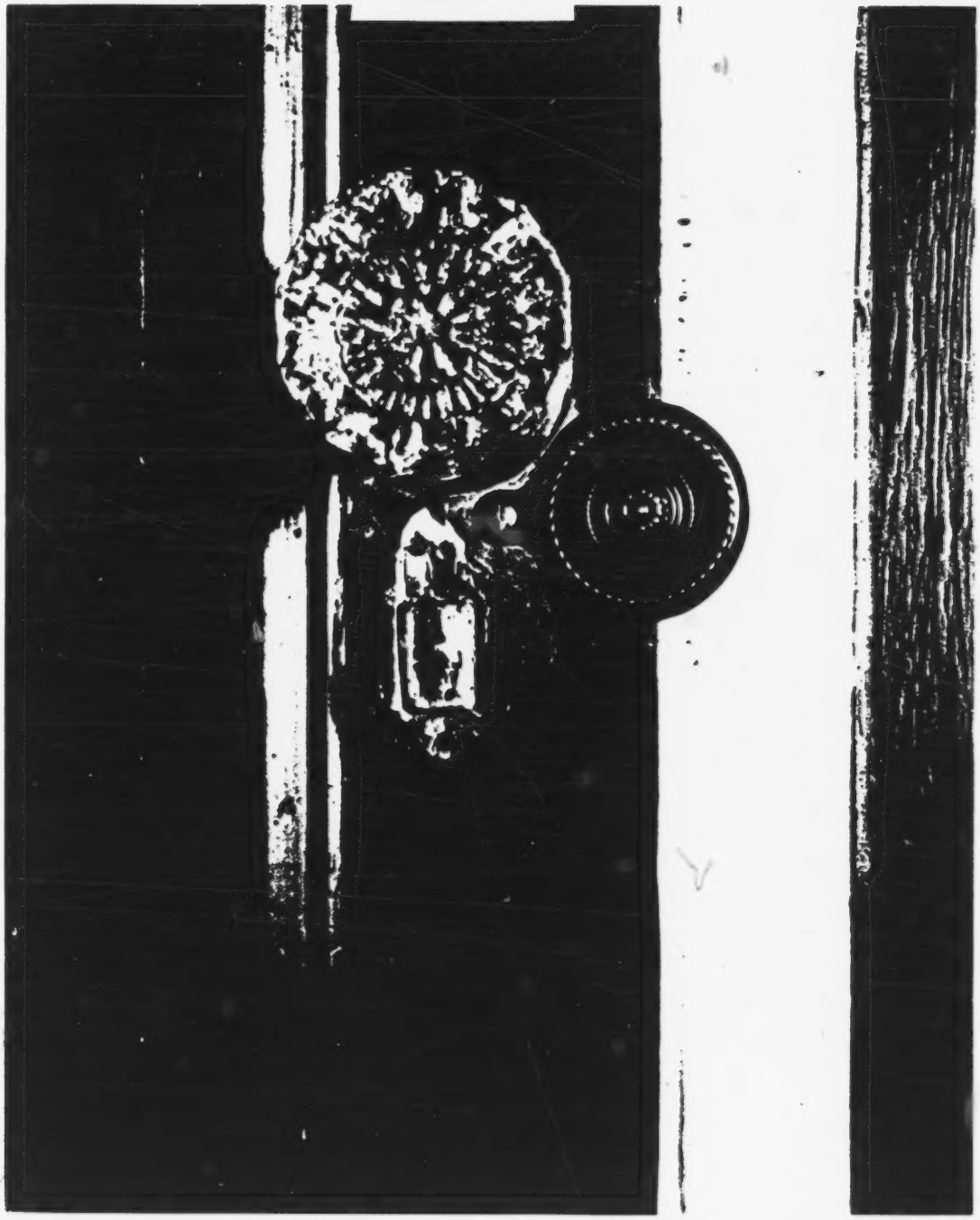
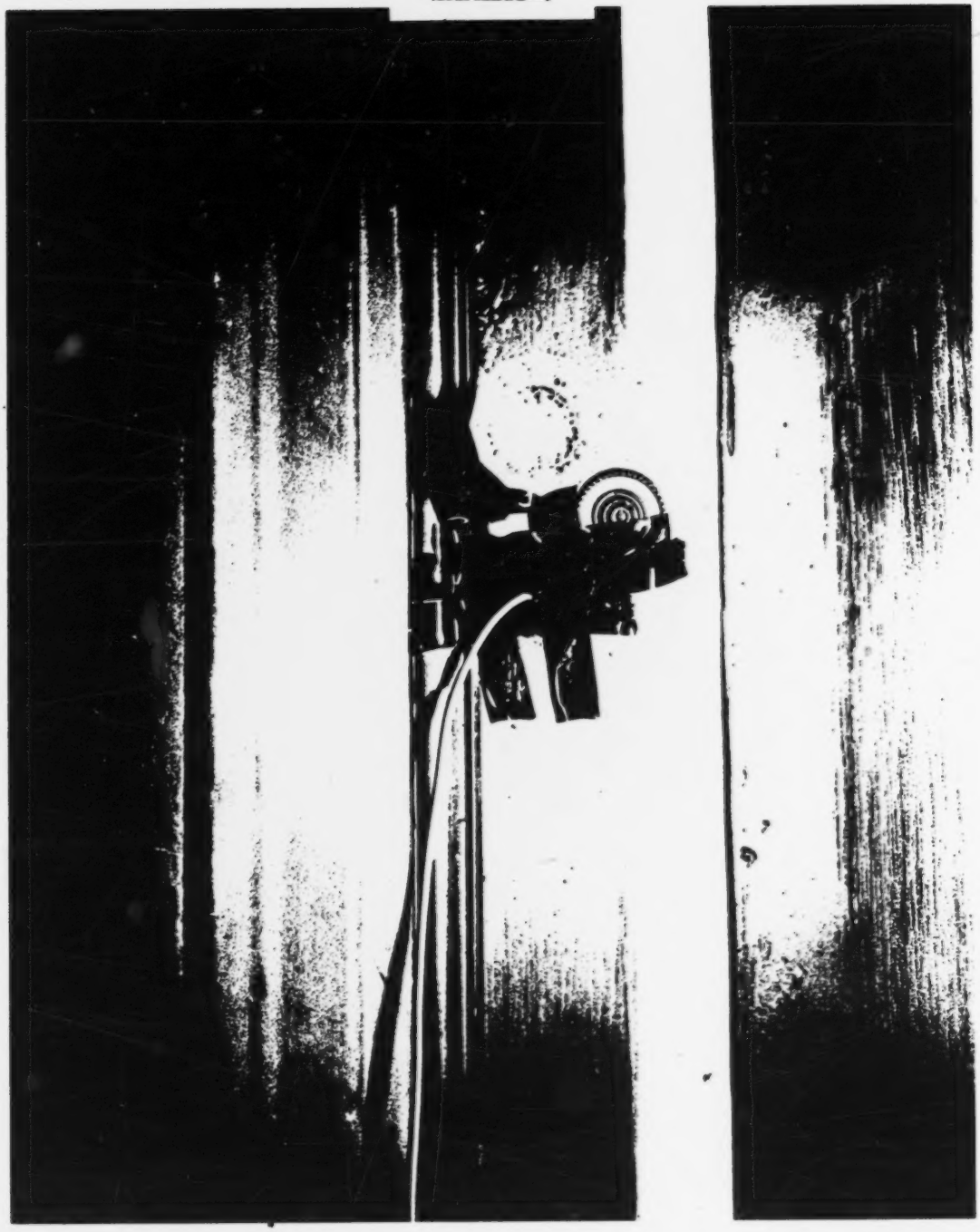
EXHIBIT 3



APPENDIX C—EXHIBIT 4

(Mounted opposite)

EXHIBIT 4



APPENDIX D

Judgment of Affirmance by United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of June one thousand nine hundred and sixty-five.

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges,
HON. M. JOSEPH BLUMENFELD,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SALVADOR PARDO-BOLLAND and RENE BRUCHON,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk
By VINCENT A. CARLIN
Chief Deputy Clerk